Aminah bte Abas v Pentadbir Tanah Daerah Kuantan

HIGH COURT (KUANTAN) – LAND REFERENCE NO 15-29 OF 2001
MOHAMED APANDI ALI JC
12 OGOS 2003

Land Law — *Land acquisition — Application for postponement of hearing — Land Acquisition Act 1960, paragraphs 3 and 6 of the Third Schedule — Whether mandatory in which any failure to comply is fatal — Whether there was inordinate delay — Whether application for postponement liable to be struck off*

This was a land reference matter that first came up for hearing on 22 May 2002. On the hearing date, the applicant requested for an adjournment because the applicant's valuation report was not ready. The case was then postponed to 31 July 2002. Again on 31 July 2002, the applicant applied for postponement, based on the same reason. The case was then postponed to 26 September 2002. Later the case was further postponed to 27 November 2002 and then to 5 February 2003 and later to 23 April 2003 because the presiding judge was transferred. Up to the date of hearing on 9 June 2003, the applicant failed to file the valuer's report in court. On that hearing date, the applicant applied for postponement based on two reasons; (i) affidavit in support of the application has not been filed; and (ii) applicant's valuation report has not been filed. The State Legal Adviser applied to the court to strike off the application, for failure to comply with the provisions of paragraphs 3 and 6 of the Third Schedule of the Land Acquisition Act 1960 ('the Act').

Held, allowing the application of striking out:

(1) The imperative effect and nature of the provisions in paragraphs 3 and 6 of the Third Schedule of the Act can be seen in the usage of the word 'shall' in every sub-paragraph of paragraph 3 and the words 'must' and 'unless' in paragraph 6. The provisions in paragraph 3 of the Third Schedule of the Act are mandatory provisions in which any failure to comply is fatal. The provision in paragraph 6 of the Third Schedule is also prohibitory in nature. The provisions of the Third Schedule of the Act are of utmost importance and it must have been the object of the legislation to make them mandatory. Paragraphs 3 and 6 of the Third Schedule of the Act are imperative provisions (see p 675D–E).

(2) The non-compliance by the applicant was beyond reproach, bordering on defiance. The delay was inordinate and so obvious that it made a mockery of the provision of time frame to act in paragraph 3 of the Third Schedule of the Act. From the first date of hearing on 22 May 2002 and after a total of five adjournments until the hearing date on 9 June 2003, over a span of about 12 and a half months, there was no application or any indication to apply

for extension of time to file the applicant's valuation report (see p 677F). A

(3) The Third Schedule of the Act is part and parcel of the law relating to land acquisition. Wherefore the compensation, whether it is an award or deemed to be an offer must be according to the requirement of the law. *A fortiori* the applicant in this case has not been deprived of adequate compensation, just that she could not have her award reviewed by way of reference, due to her blatant non-compliance with the mandatory provisions of the law (see p 678C). B

C

[Bahasa Malysia summary

Ini merupakan satu perkara perujukan tanah yang mula dibicarakan pada 22 Mei 2002. Pada tarikh perbicaraan, pemohon meminta suatu penangguhan kerana laporan penilaian pemohon tersebut belum lengkap. Kes ini kemudiannya ditunda ke 31 Julai 2002. Sekali lagi pada 31 Julai 2002, pemohon tersebut memohon mendapatkan pernundaan, berdasarkan alasan yang sama. Kes tersebut ditunda he 26 September 2002. Seterusnya, kes tersebut ditunda lagi ke 27 November 2002 dan 5 Februari 2003 dan juga ke 23 April 2003 kerana hakim yang mengetuai telah dipindah ke mahkamah lain. Sehingga tarikh perbicaraan pada 9 Jun 2003, pemohon tersebut gagal memfailkan laporan penilai di mahkamah. Pada tarikh perbicaraan tersebut, pemohon memohon penundaan atas dua alasan; (i) bahawa afidavit menyokong permohonan tersebut belum difailkan; dan (ii) laporan penilaian pemohon belum difailkan. Penasihat Guaman Negeri telah memohon ke mahkamah ini untuk membatalkan permohonan tersebut atas sebab ia gagal menurut peruntukan perenggan 3 dan 6 Jadual Ketiga Akta Pengambilan Tanah 1960 ('Akta tersebut'). D E F

Diputuskan, membenarkan permohonan pembatalan:

(1) Kesan dan sifat imperatif peruntukan-peruntukan dalam perenggan-perenggan 3 dan 6 Jadual Ketiga Akta tersebut dapat dilihat dalam penggunaan perkataan 'mesti' dalam setiap sub-perenggan perenggan 3 dan perkataan-perkataan 'mesti' dan 'melainkan' dalam perenggan 6. Peruntukan-peruntukan dalam perenggan 3 Jadual Ketiga Akta tersebut adalah amat mustahak dan ia pasti kehendak undang-undang untuk menjadikannya bersifat mandatori. Perenggan-perenggan 3 dan 6 Jadual Ketiga Akta tersebut adalah peruntukan-peruntukan imperatif (lihat ms 675D–E). G H

(2) Ketidakpatuhan pemohon sudah melampaui teguran dan membatasi keingkaran. Kelewatan tersebut begitu keterlaluan dan jelas sehingga ia seolah mempersendakan peruntukan had masa untuk bertindak dalam perenggan 3 Jadual Ketiga Akta tersebut. Daripada tarikh perbicaraan pertama pada 22 Mei 2002 I

dan selepas lima penangguhan sehingga tarikh perbicaraan pada 9 Jun 2003, dalam tempoh masa lebih kurang 12 bulan setengah, tidak terdapat apa-apa permohonan atau petanda niat untul memohon perlanjutan masa untuk memfailkkan laporan penilaian pemohon (lihat ms 677F).

(3) Jadual Ketiga Akta tersebut merupakan sebahagian daripada undang-undang berkenaan pengambilan tanah. Oleh itu, bayaran pampasan, sama ada ia merupakan satu award atau disifatkan sebagai satu tawaran, mestilah berdasarkan keperluan undang-undang. *A fortiori* pemohon dalam kes ini tidak kehilangan pampasan yang munasabah, award beliau cuma tidak dapat dikaji semula melalui perujukan disebabkan kesungguhtidakpatuhan beliau terhadap peruntukan-peruntukan mandatori undang-undang (lihat ms 678C).

Notes

For cases on land acqusition, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2574.

Rozilan bin Abdul Rahman (*Tan Kong Hai & Tui*) for the applicant.
Abdul Rahman bin Sebli(State Legal Adviser, Pahang) for the respondent.

Cases referred to

Mat Yassin Dollah v Ibrahim Hussin & Anor [1996] 4 CLJ 395 (refd)
Datuk Bandar Kuala Lumpur v Seman bin Amat & Anor [1996] 2 AMR 2584 (refd)
Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 CLJ 309 (refd)
Ng Kok Kin v PP [1995] 2 MLJ 35 (refd)
PP v Yap Min Woie [1996] 1 MLJ 169 (refd)
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155 (refd)
Howard v Hodington [1987] 2 PD 203 (refd)
Kerridge v Lamdin [1950] 2 All ER 1110 (refd)
Universiti Malaya & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2003] 3 MLJ 185 (refd)

Legislation referred to

Arahan Amalan No 11 tahun 87
Courts of Judicature Act 1964 Schedule
Federal Constitution art 13
Juvenile Courts Act 1947 ss 12, 28
Land Acquisition (Amendment) Act 1997 (Act A999)
Land Acquisition Act 1960 s 45(1A), (1B), paras 3, 6, Third Schedule
Lembaga Kemajuan Ikan Malaysia Act 1971 s 20
Rules of the Court of Appeal 1994 r 18(4)(c)

Rules of the High Court 1980 O 3 r5
Subordinate Court Rules 1980 O 49 r 3A(i)

Mohamed Apandi Ali JC:

This is a land reference matter which came up for hearing on 9 June 2003. On the said hearing date, counsel for the applicant applied for postponement based on two reasons:

(a) affidavit in support of the application has not been filed; and

(b) applicant's valuation report has not been filed.

Upon objections by the State Legal Adviser and upon the application of State Legal Adviser, the court struck off the application, for failure to comply with the provisions of paras 3 and 6 of the Third Schedule of the Land Acquisition Act 1960.

The applicant, not satisfied with the decision now appeals against the said decision. I now give my grounds for the decision.

The relevant law

The only relevant law applicable for purposes of the proceeding is none other than the Land Acquisition Act 1960. In particular, the relevant provisions of the Act are s 45 and the Third Schedule. Section 45 of the Land Acquisition Act 1960 reads as follows:

> Proceedings to be in open Court
>
> (1) Every proceeding under this Part shall take place in open court.
>
> [(1A) The provisions of the Third Schedule shall apply to every proceeding under this Part.]
>
> [(1B) The Rules Committee appointed under the Courts of Judicature Act 1964 may amend the provisions of the Third Schedule relating to the procedure to be followed by the Court in all proceedings under this Act.]
>
> (2) Save in so far as they may be inconsistent with anything contained in this Act, the law for the time being in force relating to civil procedure shall apply to all proceedings before the Court under this Act.

It is therefore crystal clear that the provisions of the Third Schedule (which is entitled *Evidence and Procedure in Land Reference Cases*) shall apply to this particular proceeding. It is also clear that the acquisition proceedings relating to this reference took place in year 2001, ie after the coming into effect of the Land Acquisition (Amendment) Act 1997 (Act A999) which came into effect on 1 March 1998. The Act A999 added the subsections (1A) and (1B) to s 45 of the Act. The Third Schedule also came with the said Amendment Act A999.

History of the Third Schedule

A Prior to Act A999, the procedural provision in respect of Land Reference cases were governed by a High Court practice note, known as 'Arahan Amalan No 11 tahun 87', which I hereby reproduce in toto, as follows:

MAHKAMAH TINGGI MALAYA ARAHAN AMALAN NO. 11 TAHUN 87

B

LAPORAN-LAPORAN PENILAIAN DALAM KES-KES PENGAMBILAN TANAH

1 Yang Amat Arif Hakim Besar Malaya, dengan ini mengarah bahawa prosedur berikut hendaklah berkuatkuasa dalam perbicaraan kes-kes C pengambilan tanah:

(a) Melainkan penilai tanah, semua keterangan hendaklah dikemukakan melalui afidavit. Deponen boleh dipanggil untuk diperiksa balas di mana sekurang-kurangnya notis 7 hari hendaklah diberi terlebih dahulu oleh pihak yang memanggilnya. Laporan penilaian pihak pemohon itu sendiri D mestilah membuktikan suatu kes prima facie bagi pihak pemohon. Keterangan lisan oleh penilai yang dipanggil oleh pihak pemohon hendaklah hanya dikemukakan dalam pemeriksaan balas dan dalam pemeriksaan semula. Begitu juga, laporan penilaian pihak responden mestilah mencukupi E untuk mematahkan laporan penilaian pihak pemohon. Kaedah berhubung dengan pemberian keterangan lisan, pemeriksaan balas dan pemeriksaan semula penilai pihak pemohon adalah juga terpakai kepada penilai pihak responden.

(b) Begitu juga, kecuali laporan penilaian, mana-mana dokumen yang perlu dikemukakan hendaklah melalui afidavit. F

(c) Melainkan di mana ia telah termasuk dalam Perujukan Pemungut kepada Mahkamah di bawah seksyen 36(2), Akta Pengambilan Tanah, keterangan oleh tuan punya berdaftar adalah tidak perlu dikemukakan. Jika, atas apa-apa sebab keterangan- nya perlu dikemukakan, ia hendaklah dibuat G melalui afidavit. Seperti dalam kaedah (a) di atas dia mungkin dipanggil untuk diperiksa balas mengenai afidavitnya di mana sekurang-kurangnya notis 7 hari hendaklah diberi terlebih dahulu oleh pihak yang memanggilnya.

(d) Pemohon dan responden hendaklah memfailkan empat salinan laporan penilaian mereka di Mahkamah dalam H tempoh 7 hari sebelum tarikh perbicaraan. Di mana laporan itu mengandungi pelan jualan yang setanding, penilai bagi pihak pemohon hendaklah mengusahakan suatu pelan bersama dengan penilai bagi pihak responden supaya dimasukkannya laporan penilai bagi pihak responden yang I setanding itu.

(e) Pemohon dan responden hendaklah memfailkan laporan di Mahkamah dan, antara mereka hendaklah menyampaikan

laporan masing-masing antara satu sama lain tidak kurang daripada 21 hari sebelum tarikh perbicaraan. Setiap pihak kemudiannya hendaklah juga memfailkan di Mahkamah dan antara mereka hendaklah menyampaikan jawapan antara satu sama lain, sekiranya ada, tidak kurang daripada 7 hari sebelum tarikh perbicaraan.

(f) Semua afidavit hendaklah difailkan di Mahkamah sekurang-kurangnya 7 hari sebelum tarikh perbicaraan. Kaedah dalam (e) di atas berhubung dengan cara dan tempoh bagi penyampaian laporan penilai tanah hendaklah, menurut cara yang sama, juga terpakai kepada afidavit.

(g) Melainkan dinyatakan sebaliknya, penghujahan muktamad peguam di Mahkamah hendaklah secara bertulis. Mahkamah hendaklah pada keseluruhannya berhak menentukan susunan penghujahan, cara dan tempoh bagi penyampaikan yang berkenaan.

2 Laporan dokumen atau afidavit yang tidak mematuhi Kaedah-Kaedah di atas tidak akan dibenarkan diterima.

3 Arahan Amalan No. 1 Tahun 1982 dengan ini dibatalkan.

4 Arahan ini hendaklah berkuatkuasa mulai daripada tarikh ini.

Arahan Amalan 1 Tahun 1982 dibatalkan.

Zainal Abidin bin Mohd. Wazir

Pendaftar

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR. 12 DISEMBER 1987

BIL: (68) DLM. JK/MA 328

Diedarkan kepada:

YAA Ketua Hakim Negara, Malaysia serta Yang Arif-Yang Arif

Hakim Mahkamah Agong dan Hakim Mahkamah Tinggi

It is noted that para 2 of the Third Schedule of the Act is in pari materia to the old para 1(a) of the Practice Note 11 of 1987. Paragraph 3 of the Third Schedule is in pari materia to para 1(d) and (e) of the said Practice Note; and paragraph 6 of the Third Schedule is in pari materia to paragraph 2 of the Practice Note of 87.

Basically, what was provided for by the Practice Note No. 11 of 1987 are now codified and incorporated as the Third Schedule of the Act, under the heading: EVIDENCE AND PROCEDURE IN LAND REFERENCE CASES.

A *Are the provisions mandatory or directory*

The relevant provisions of the Third Schedule, are paragraphs 3 and 6, which respectively reads as follows:

3 Filing and service of valuer's report

B (1) Each party to the proceeding shall, not less than seven days before the date of hearing, file in Court four copies of his valuer's report.

(2) Each party to the proceeding shall, not less than seven days before the date of hearing, serve on the other party and file in Court his valuer's reply to the other party's valuer's report.

C (3) Each party to the proceeding shall, not less than seven days before the date of hearing, serve on the other party and file in Court his valuer's reply to the other party's valuer's report.

6 Paragraphs 2, 3, 4 and 5 must be complied with

D No report, affidavit or other document shall be admitted in evidence unless the provisions of paragraphs 2, 3, 4 and 5 are complied with.

The imperative effect and nature of the provisions in paras 3 and 6 of The Third Schedule can be seen in the usage of the word 'shall' in every sub-paragraph of para 3 and the words 'must' and 'unless' in para 6. It is my E considered view that the provisions in para 3 of the Third Schedule of the Act are mandatory provisions in which any failure to comply is fatal. I am also of the view that the provision in para 6 of the Third Schedule is prohibitory in nature.

From the history and development of the earlier Practice Note of 1987 which had metamorphosized into law in the form of the Third Schedule, I F find that despite the headings being evidence and procedure, it has become substantive law.

There is a plethora of case law which says that when the word 'shall' is used, even in procedural law, such provision is mandatory and not directory. What more when, as in this case, it forms part of the substantive G law.

Examples of mandatory meaning of the word "shall" in procedural law can be seen in the cases of:

(i) *Mat Yassin bin Dollah v Ibrahim Hussin & Anor* [1997] 2 MLJ 681, where Nik Hashim JC (now Court of Appeal Judge) ruled that O 49 r H 3A(i) of the Subordinate Court Rules 1980 to be a mandatory provision by reason of the word 'shall' contained therein;

(ii) Likewise Abdul Kadir Sulaiman J (now Court of Appeal J) in *Datuk Bandar Kuala Lumpur v Seman bin Amat & Anor* [1996] 2 AMR 2584, concluded that the word 'shall' in O 49 r 6(2) of the Subordinate I Court Rules 1980 is mandatory and further added that rules of the Court must be obeyed and any failure to comply with them will lead to chaos in the conduct of litigation;

(iii) Similarly, the Court of Appeal in *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389, the court held that the word 'shall' in r 18(4)(c) of the Rules of the Court of Appeal 1994 means 'obligatory' and that the rule is mandatory and must therefore be strictly adhered to.

Mandatory meaning in substantive law by virtue of the usage of the word 'shall' can be seen in the cases of:

(i) *Ng Kook Kin v Public Prosecutor* [1995] 2 MLJ 35, the learned judge stated that the word 'shall' in s 20 of the Lembaga Kemajuan Ikan Malaysia Act 1971, on the question of jurisdiction of the sessions court, 'reflects a measure of mandatoriness in it.

(ii) The Federal Court in *Public Prosecutor v Yap Min Woie* [1996] 1 MLJ 169, concluded that the word 'shall' as appearing in ss 12 and 28 of the Juvenile Courts Act 1947 means mandatory. The issue then was whether the High Court had the power or discretion to reduce the period of detention from three years to one year, under the provision of section 28 of the Act which states: 'When a Juvenile Court orders a juvenile to be sent to an approved school, the order **shall** be an authority for his detention therein for a period of three years or until he attains the age of fourteen years whichever is the longer.' In construing the word 'shall' the Court held that 'where a court tribunal is given in terms a power to exercise a certain jurisdiction, this may be construed as imposing a mandatory duty to act'.

There are a host of other authorities and cases giving the interpretation of the word 'shall' to be mandatory or imperative. However the best guide to distinguish mandatory and directory duties can perhaps be seen in the decision of the Federal Court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 which quoted Lord Penzance in *Howard v Hodington* [1987] 2 PD 203 at p 211, who stated:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

With that guidance and with the evolution of the provision of the Third Schedule from a practice note to substantive law, I have no hesitation to view that the provisions therein are of utmost importance and it must have been the object of the legislation to make them mandatory. I therefore conclude that paras 3 and 6 of the Third Schedule of the Land Acquisition Act 1960 to be imperative provisions.

On the subject matter of where time is prescribed for doing any act, the Land Acquisition Act 1960 does not provide any provision for enlargement. On this point I find support in *Kerridge v Lamdin* [1950] 2 All ER 1110 where the Court of Appeal held that the Court has no power to extend a period of time limited by statute for doing an act unless the statute so

provides. Jenkins LJ, at p 1113 in the case, said:

> One reaches a conclusion of this kind with some regret, for it is never very satisfactory that a possibly meritorious claim should be excluded merely because the claimant has inadvertently allowed time to expire, but where a stature confers a right and stipulates that it must be exercised within a prescribed period, that period must be observed, and, in the absence of any provision in the Act allowing the time to be relaxed, failure to observe the prescribed period must inevitably be fatal to the claim.

Facts taken into consideration

This land reference first came up for hearing on 22 May2002. On the said hearing date, counsel for applicant requested for adjournment because the applicant's valuation report was not ready. Case was then postponed to 31 July 2002. Again on 31 July2002, counsel for applicant applied for postponement, based on the same reason, ie applicant's valuation report was not ready. Case was then postponed to 26 September 2002. Later the case was further postponed to 27 November 2002 and then to 5 February 2003 and later to 23 April 2003 because the presiding judge was transferred. Up to the date of hearing on 9 June 2003 the applicant failed to file the valuer's report in court.

On the other hand the respondent filed their valuer's report on 27 April 2002, ie before the first date of first hearing (which was 22 May 2002). This was in compliance with para 3(1) of he Third Schedule.

The respondent also, in compliance with para 3(2) had served a copy of their valuation report on the applicant on the same date.

The non-compliance by the applicant is beyond reproach, bordering on defiance. The delay was inordinate and so obvious that it made a mockery of the provision of time frame to act in para 3 of the Third Schedule.

Finally, the case came up for hearing on 9 June 2003, where the application was struck off for failure to comply with the provisions of paras 3 and 6 of the Third Schedule of the Land Acquisition Act 1960.

It is noted that from the first date of hearing on 22 May 2002 and after a total of 5 adjournments until the hearing date on 9 June 2003, over a span of about 12 and a half months, there was no application or any indication to apply for extension of time to file the applicant's valuation report. This, possibly, can be done under O 3 r 5 of Rules of the High Court, or under para 8 of the Schedule of the Courts of Judicature Act 1964 as s 45(2) of the Land Acquisition Act 1960 provide for the applicability of law for the time being in force relating to civil procedure. Such application, if made would probably be approved based on the current judicial thinking of administering justice in the name of justice and not on rules of procedure or technicality. Unfortunately, nothing was done or even any indication for such intended action.

I am mindful of the decision in *Universiti Malaya & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2003] 3 MLJ 185, when the learned Judge refused to strike out the Reference because the award given

is deemed to be an offer and opportunity ought to be given for the applicant to be heard. Nevertheless, land acquisition and adequate compensation as enshrined for the protection of property under Art 13 of the Federal Constitution reads as follows:

> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for compulsory acquisition or use of property without adequate compensation,"

The operative words are 'in accordance with law'. The Third Schedule is part and parcel of the law relating to land acquisition. Wherefore the compensation, whether it is an award or deemed to be an offer must be according to the requirement of the law. *A fortiori* the applicant in this case has not been deprived of adequate compensation, just that she could not have her award reviewed by way of reference, due to her blatant non-compliance with the mandatory provisions of the law.

In view of the above authorities and guides for the interpretation of the word 'shall' in The Third Schedule to the Land Acquisition Act 1960 and after considering the facts relating to the non-compliance of the relevant mandatory provisions, I have no alternative but to concede to the application by the respondent to strike out the Reference. I, therefore, struck off the land reference.

Application of striking out allowed.

Reported by Peter Ling